IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-11351114
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: John D. POMPEY

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1760

John D. POMPEY

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 9 September 1968, an Examiner of the United States Coast Guard at New York, N. Y., suspended Appellant's seaman's documents for six months plus six months on twelve months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as first cook on board SS SANTA MARIA under authority of the document above captioned, on or about 27 April 1968, Appellant wrongfully assaulted and battered with his hand a fellow crewmember, Arthur Eggenberg, causing injury, while the vessel was at sea.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of Authur Eggenberg, some relevant photographs of Eggenbert, and voyage records of SANTA MARIA.

In defense, Appellant offered in evidence the testimony of five witnesses, including his own, certain medical records, and a record of a notice of claim filed with the owner of SANTA MARIA,

At the end of the hearing, the Examiner rendered a decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of six months plus six months on twelve months' probation.

The entire decision was served on 11 September 1968. Appeal was timely filed on 23 September 1968 and was perfected on 14 January 1969.

FINDINGS OF FACT

On 27 April 1968, Appellant was serving as first cook on board SS SANTA MARIA and acting under authority of his document while the ship was at sea.

At about 1900 on that date, Appellant and Arthur Eggenberg, butcher, were in the ship's galley. In an exchange of argumentative remarks, Eggenbert asked Appellant whether he was smoking "weed" again. Appellant became angry and struck Eggenberg several times in the area of the eyes and nose with his fist. Eggenberg fell to the deck, bleeding profusely.

Eggenberg remained in the ship's hospital until arrival at Santo Domingo where he was removed from the vessel. He was flown beck to New York. On 31 May 1968 he was found "fit for duty" by the U. S. Public Health Service.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner.

The original notice of appeal contained as statement of the bases for appeal that the "decision rendered is contrary to the weight of the evidence..." and that "the punishment is excessive."

The brief on appeal expands upon this statement with two POINTS.

POINT I is set out thus:

> THE DECISION OF THE EXAMINER IS AGAINST THE WEIGHT OF INCREDIBLE EVIDENCE."

It is assumed here that there is a typographical error and that the term intended was "CREDIBLE EVIDENCE."

POINT II is set out thus:

> "THE DECISION IS EXCEEDINGLY HARSH, CRUEL AND UNUSUAL PUNISHMENT."

From the specifics of the brief, this is contrued to mean that even if the facts were established the Examiner's order was "exceedingly..." et cetera.

APPEARANCE: Zwerling & Zwerling, New York, N. Y., by Irving Zwerling, Esq.

OPINION

I

Fundamentally, the attack upon the Examiner's findings in this case boils down to the question of "substantial evidence" to support the Examiner's findings of fact, and the credibility of witnesses. Two things are elementary in administrative proceedings:

(1) that the credibility of witnesses is to be initially determined by the trier of facts; and

(2) that findings of fact by an examiner will not be disturbed if they are supported by substantial evidence.

To find that an examiner's assessment of credibility of a witness was wrong would require, on decision on appeal from the examiner's decision a finding that a reasonable person could not have believed the testimony of the witness insofar as the examiner accepted it as a basis for findings.

Appellant offers several detailed arguments in support of his thesis.

At one point Appellant asserts that "the unreliability of the chief corroborating witness for the Government, namely, Mr. Saverio Renzi, shows that the decision was based, in my opinion, more upon the previous record, which was openly discussed by the person charged, rather than the sum total of the facts herein."

The fact is that the testimony of the witness Renzi did tend to corroborate the testimony of the alleged victim of the assault and battery (e.g., that when the victim was first seen by the witness he was lying on the deck freshly bleeding, contra insinuations by Appellant that the injury had been received earlier and not at the hands of Appellant). Appellant cannot complain of this corroboration because the witness was called not by the Investigating Officer but by Appellant himself. There is not a hint in the record that the witness was called as a hostile witness, nor that Appellant was surprised by any testimony given. The corroboratory effect of the testimony is even stronger under these circumstances.

Appellant's conclusion from this argument must also be rejected. Under questioning by Counsel on direct examination, Appellant voluntarily disclosed that his document had once been revoked and, on a later occasion, been suspended on probation. R-119,120. Appellant cannot now complain that a tactic which he adopted for some good reason might have influenced the Examiner in some way. However, it may be said here that the Examiner's

analysis of the evidence shows no trace of prejudice but rather that each finding made by him has a predicate in the record of evidence on the question in issue before him.

If Appellant's view were accepted, any order of an examiner could be frustrated if the person's prior record was voluntarily disclosed to the Examiner during the course of hearing.

III

Appellant further argues that because the Examiner made some findings which could be critical of the character of the alleged victim he should have rejected all of the victim's testimony out of hand. Appellant cites two court decisions in support of this theory. One, People of the State of New York v Halliday (1932) 237 App. Div. 302, 261 NYS 342, held that a "blackeye" does not amount "as a matter of law" (underscoring supplied by Appellant) to grievous bodily harm and that a blow struck in legitimate self-defense is no offense. The first proposition is irrelevant to this case. The second, undeniably good law, does not apply either, for while the Examiner found probable provocation for the attack in the use of insulting language by the victim, he held correctly that provocative words alone do not excuse an assault and battery.

The second cited decision, People of the State of New York v Denker(1929) 225 App. Div. 517, 234 NYS 32, holds only that use of reasonable force is justified to repel an assault and battery. For the reason just given, the principle does not apply to this case.

IV

Appellant also attacks the fundamental credibility of the victim by referring to the fact that he had filed a claim against the shipowner, and thus a motivation to lie had been established. Appellant says, "We are all sophisticated enough to know that the latest trend in seaman cases based upon court decisions is first to use the United States Coast Guard as a lever to pry the money out of the companies." Appellant asserts collusion between the victim and his own witness, Renzi, to perpetrate a fraud upon the shipowner.

Whether Appellant's general observation is true does not matter as long as he does not imply (and he does not imply) that the Coast Guard or any of its personnel are parties to the fraud. The point is that an effort to establish such a motivation of self-interest as to render the testimony of the witness unbelievable is directed to the examiner as trier of facts. If he is not persuaded the principles set out in the first section of this Opinion control on appeal.

It may not be amiss here to observe that the Examiner had before him in evidence an Official Log Book entry made by the master to the effect that Appellant had attacked Eggenberg, and that, attached to that entry was a statement signed by Appellant which said:

> "In regards to the incident that happened in the Galley, Saturday night 4/27/58, all I have to say is that the Butcher made a crack, `are you smoking the weed again', I got mad and hit him, after he had provoked me."

For the Examiner to have accepted the asserted collusion as grounds for rejecting the evidence as to Appellant's offense would have required him to believe that the master of the vessel and even Appellant himself were parties to the conspiracy to bilk the shipowner.

VI

In his argument that the Examiner's order is excessive, Appellant provides a list of nineteen orders in other cases entered by the three examiners at New York. It is urged that all of these orders are more lenient than that given in this case. The list is unpersuasive. Two of the orders were dismissals, obviously irrelevant to the argument. One was entered after a finding of negligence in striking a railroad bridge. Most dealt with failure to perform duties.

Only five of the orders cited dealt with assault. One order, for an assault without a battery, was entirely on probation. The four based upon proved assault and battery resulted in suspensions of two and three months. Whatever inference might be drawn from this, it is a fact that each order is tailored to the severity of the offense as evaluated by the examiner.

The "Table of Average Orders" (46 CFR 137.20-165) speaks in terms of outright suspension of six months for assault and battery causing injury. No fault could be found with an examiner who imposed a lesser order by reason of finding matters in extenuation or mitigation. So also, no fault need be found with an examiner who decides that an offense under consideration merits the "average" order in the Table.

Further, Appellant's prior record was a matter for consideration by the Examiner in framing his order. Appellant's record was somewhat greater than what he voluntarily disclosed to the Examiner. In 1955 he was suspended for two months, plus four months on twelve months' probation for wrongful possession of ship's stores and wrongful removal of ship's stores from SS UNITED

STATES. In 1955, his document was revoked for assaulting and battering another crewmember with a dangerous weapon, with resultant injury, aboard SS ARGENTINA. In 1963, after reissuance of his document by act of administrative clemency, Appellant's document was suspended for one month, plus two months on twelve months' probation for assault and battery upon another crewmember of SS ATLANTIC.

All of Appellant's proved offenses occurred aboard passenger vessels and three, including the instant case, involved violence to other crewmembers. Far from being able to say that the Examiner's order in the instant case is, as a matter of law or even of equity, unduly harsh, I could venture that the order, under all the circumstances, is more lenient than otherwise. Under the "Table of Average Orders" for repeated offenses, the Examiner might have entered a more severe order. If he felt constrained to be lenient in view of the provocative language he found used, that is within his discretion. Appellant cannot however expect me to find, as he asks, that no outright suspension at all should be required.

CONCLUSION

The Examiner's findings are based upon substantial evidence and his order is not excessive.

ORDER

The order of the Examiner dated at New York, N. Y., on 9 September 1968, is AFFIRMED.

W. J. SMITH
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 2 day of MAY 1969.